

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON D.C.**

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NIGEL HOBBS, an Individual

Petitioner,

and

WINCO FOODS, LLC and  
WINCO HOLDINGS, INC., a single employer  
Respondents.

Cases: 28-CA-181651  
28-CA-190617  
28-CA-190624

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**RESPONDENTS' BRIEF  
TO THE NATIONAL LABOR RELATIONS BOARD**

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Respondents, WinCo Foods LLC and WinCo Holdings, Inc. (“Respondents” or “WinCo”) respectfully submits its post-hearing brief in accordance with Section 102.42 of the National Labor Relations Board’s Rules and Regulations.

### **INTRODUCTION**

This case concerns the following issue for the Board: Do Respondents’ employment policies violate Section 8(a)(1) of the National Labor Relations Act (“NLRA” or “the Act”)? The answer is a resounding no.

The time has come to overturn the flawed standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). As articulated by now Acting Chairman Miscimarra’s dissent in *Beaumont Hospital*, 363 NLRB No. 162 (2016), the *Lutheran Heritage* test is flawed, illogically considers “only the potential, hypothetical impact of a particular rule on NLRA-protected activity, even though such activity might occur,” and has “defied all reasonable efforts to make it yield predictable results.” Further, the test has “created enormous challenges for the Board and courts and immense uncertainty and litigation for employees, unions and employers.” *Id.* at p. 9. The better test, is a balancing test that evaluates “(i) the potential adverse impact of the rule on NLRA-protected activity, *and* (ii) the legitimate justifications an employer may have for maintaining the rule.” *Id.* at p. 9. In other words, Board should engage in a “meaningful balancing of these competing interest, and a facially neutral rule should be declared unlawful *only* if justifications are outweighed by the adverse impact on Section 7 activity.” *Id.* at p. 9 (emphasis in original).

Regardless of the standard applied, WinCo’s policies are lawful. First, all of the policies were negotiated and agreed to between WinCo and the bargaining unit. It is well established that a collective bargaining representative may waive members’ statutory rights under the Act. The Act “extinguishes the individual employee’s power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.” *N.L.R.B. v. Allis Chambers MFG. Co.*, 388 U.S. 175, 180 (1967). By adopting the provisions of the WinCo Employee Handbook and incorporating the rules in the Collective Bargaining Agreement, WinCo and the bargaining unit agreed to the wording of the specific

work rules, such as a basic dress code, the types of tattoos employees can display at work, the use of foul language, and access to company computers. (Jt Exh. 1(p) at pp. 2, 10.) There is no evidence that WinCo, the Employee Association, or any employee construed the policies to chill any protected rights.

Moreover, all of WinCo's policies are facially neutral, none of the policies were created in response to any Section 7 activity, and none of the policies have been applied to restrict any employee's Section 7 activity. More importantly, a reasonable employee applying common sense would not, and could not, interpret any of the policies at issue as restricting any Section 7 activity. For example, WinCo's policies against offensive tattoos, encouragement, but not requirement, to keep harassment and discrimination investigations confidential and restriction of use of grocery store phones, copiers and fax machines for business use only serve legitimate business reasons and could not realistically be interpreted by employees to restrict Section 7 activity. The General Counsel will not be able to meet the burden required to deem the policies in question as unlawful.

Finally, WinCo also has a Fifth Amendment right to protect its property. Specifically, as the property owner of its computer systems, telephones and fax machines, WinCo has the right to determine who is allowed to access and use its property. WinCo also has a Fifth Amendment right to restrict certain conduct, such as audio and video recordings, on its property. WinCo's property rights clearly outweigh its employees' hypothetical Section 7 rights.

For the reasons discussed more fully below, Respondents respectfully request that the Board dismiss the Complaint.

## **STATEMENT OF FACTS**

### **I. BACKGROUND FACTS**

#### **A. The Respondents**

The parties stipulated to the following facts. At all material times, WinCo has been engaged in the retail sale and distribution of consumer goods, groceries, and related products and services. (Joint Fact ("JF") 1(f).) WinCo has offices and grocery stores in Arizona, California, Nevada, Idaho, Oregon, Texas Utah and Washington State. (JF 2.) These stores serve thousands

of customers who go into the stores to purchase groceries every day. (JF 5(w).) WinCo owns the properties upon which its grocery stores exist. (JF 5(x).) WinCo also owns the computer system and networks used in the stores, including but not limited to their computers and telephones. (JF 5(y).)

The underlying charges were filed by a former employee of WinCo's Gilbert Arizona Store. (JFs 5(a)-(c).) A collective bargaining agreement covers the terms and conditions of employment for employees at the Gilbert Store. (JF 5(z), Joint Exhibit ("Jt Exh.") (p).) An employee organization recognized under the Act represented the employees. (See Jt Exhs. 1(l), 1(m)(Complaint and Answer); *see also* Jt Exh. 1(p)(Hourly Employee Working Conditions & Wages Agreement).)

## **B. WinCo's Policies**

Since on or about June 30, 2016, WinCo has maintained the following rules at their stores and places of business. (JF 5(s).) Those portions of WinCo's employment policies that are at issue are highlighted in bold:

### **I. WORK PERFORMANCE**

#### **All employees are expected to:**

1. Contribute to a positive work environment through cooperative and professional interactions with co-workers, customers and vendors. Employees are expected to extend courtesy to customers and fellow workers and cooperate with other employees at all times. **Employees are not to use abusive, foul, or offensive language, engage in gossip, or otherwise cause unrest amongst employees, customers or vendors.**
2. Be productive, do quality work and follow the directives of supervision.
3. Practice good housekeeping. Keep work station, floor, aisles, doorways and backrooms clear and clean. Clean up spills immediately and complete "Sweep Logs" as required. Spills should never be left unattended.
4. Not engage in horseplay or distract other workers while working.

5. Greet each customer with “Hello” or another similar greeting when the customer enters a check stand or when an employee passes a customer on the sales floor.
6. Promptly refer all customer complaints to management.
7. Employees who are assigned cash handling responsibilities are expected to comply with WinCo Foods' Cash Handling Policy.
8. Comply with WinCo Foods' Ethics Policy.

## **II. DRESS, HYGIENE, AND APPEARANCE STANDARDS**

**All employees are required to maintain the highest standards of personal hygiene, cleanliness and grooming. All employees must adhere to their location's applicable dress code and/or uniform code policy which will be posted at each location. Final judgment on appropriate dress and appearance rests solely with management.**

1. All employees are expected to exercise good grooming and hygiene practices.
2. Fingernails are to be kept neatly trimmed and clean.
3. Hands must be washed before leaving restrooms.
4. All employee hair styles must be kept clean, neatly cut and combed in a conventional style.
5. Facial hair (including mustaches, beards and goatees) must be clean, neatly trimmed, and look professional. Facial hair cannot exceed 1/2 inch in length.
6. Retail employees that have hair styles that fall in front of their faces requiring the use of their hands to brush the hair away or have facial hair, must wear hair and/or beard nets.
7. **Employees may wear or display tattoos provided that such tattoos are professional looking and in good taste. Management has the discretion to require any employee to cover tattoos that are excessive or are inappropriate. Any visible tattoo that is offensive must be appropriately covered.**
8. Each employee must comply with any additional requirements that are applicable to the employee's specific job, including but not limited to the use of hair and beard nets when working with exposed food items.

## **VIII. BULLETIN BOARDS/NO SOLICITATION**

- 1. There shall be no solicitation of or by employees for any personal business opportunities (including fundraisers, home party sales, etc.) on Company property.**
2. Company bulletin boards are for Company use only. Personal or non-WinCo Foods' postings are not allowed.

## **IX. TELEPHONE AND COMPUTER USE**

- 1. Store phones, computers, copiers, and fax machines are strictly business machines and employees are not permitted to use them for any purpose other than Company business, except in an emergency.** Personal long distance calls are not allowed on Company telephones.
2. Employees are not to be called to the phone except on Company business or in the case of a personal emergency. All personal calls are to be placed on personal phones or pay phones during a rest break or meal period.
- 3. Use of Company computers for personal reasons is strictly forbidden. All messages sent and received, including personal messages and information stored on Company computers is Company property regardless of content. Employees have no right to privacy with respect to any messages or information received or created on Company computers. WinCo Foods reserves the right to monitor and review any employee's e-mail or internet use at any time. See WinCo Foods' Information Security Policy and WinCo Foods' Acceptable Use Policy.**
- 4. Employees are not permitted to possess or use personal handheld devices, including cellular phones, smart phones, MP3 players, audio/visual recorders, cameras, head phones, etc. while on the clock, except while on a designated rest break.**

## **X. ELECTRONIC COMMUNICATION AND RECORDING DEVICES**

**Violations of any policies listed in this section will be considered gross misconduct.**

1. Employees must never interfere with any Company video surveillance equipment.
- 2. Employees are never allowed to engage in photography or audio or visual recording on Company property unless**

**specifically authorized to do so for Company business purposes.**

**3. Employees are not to access or use any Company computers, records, files, etc. without express permission and authorization pertaining to their current title/position with the Company. Employees are not to access private employee or customer information. Employees are not to provide access to any Company information to any individual not otherwise authorized to access such information.**

**4. Employee use of computer/internet technologies outside of work must not violate any Company policy, be detrimental to the Company's interests, or interfere with the employee's regular work duties. Specifically, employees must not use the Company logo or link to its website without Company permission. Any statements the employee makes that include the Company's name must clearly identify the employee making the statement and clearly state that the statements are the employee's own opinions, and not those of the Company. Employees who engage in use of computer/internet technologies do so at their own risk and are legally responsible for their own postings and comments.**

## **XVI. GROSS MISCONDUCT**

**Commission of any act considered gross misconduct is grounds for immediate discharge. Examples are listed below. This listing is not all-inclusive and will be modified as appropriate.**

**1. Dishonesty, including but not limited to falsification of any Company record including employment records; any fraudulent act or statement related Company business or providing false information to management.**

**2. Theft. This includes but is not limited to taking, obtaining or eating any merchandise, of any value, without paying for it, regardless of any circumstances; taking, obtaining or possessing a fellow employee's, vendor's customer's personal property without express permission and authorization possession or concealment of any merchandise without a receipt; failure immediately turn in any lost/found items to management; taking, using, accessing, mishandling, borrowing or lending of Company funds, merchandise supplies, or equipment without express authorization from WinCo Foods' corporate management or the store manager; and unauthorized possession or willful or negligent destruction of Company funds, property or merchandise.**

3. **Altercations, fighting, or acts of disrespect towards customers, fellow employees or management; insubordination with management; any act of intimidation** and/or any threat of violence or act of violence of any kind.
4. Conviction of a crime that impacts the workplace, compromises the employee's position with the Company, or interferes with the employee's ability to perform his/her job duties.
5. Drinking or inhaling intoxicants, or the use, possession, or sale of any illegal substance on Company premises, whether on or off duty. Reporting to work with the odor of liquor on the breath or under the influence of intoxicants any illegal substance. Purchasing alcohol on behalf of a minor. Reporting to work in a condition that is considered unfit for duty. Failure to fully comply with WinCo Foods' Alcohol and Drug Policy and/or refusal or failure to provide a sample as required for random, reasonable suspicion, or post-accident testing.
6. **Performing any act, either on the job or off the job, which brings discredit to the Company or harms employee morale.**
7. Selling alcoholic beverages or tobacco products in violation of State or Federal Law.
8. **Unauthorized disclosure of confidential information, including but not limited to confidential Company financial, security, or trade secret information or employee legally protected information.**
9. **Unauthorized use of Company property or equipment and/or negligent or willful destruction of or damage to Company property or equipment.**
10. Violation of WinCo Foods' Shoplifter Apprehension and Robbery Policy.
11. Violation of United States Department of Agriculture Food Stamp or WI voucher procedures. Exchange of WIC vouchers or Food Stamps for cash alcohol, or tobacco products. Any unauthorized alteration of WIC voucher or Food Stamps.
12. Violation of WinCo Foods' Employee Purchases and Unauthorized Discounting Policy.
13. Violation of WinCo Foods' Non-Discrimination and Anti-Harassment Policy.

**14. Any other item listed in these Company Personnel Policies document a Gross Misconduct.**

(Jt Exh. 1(n)(emphasis added).)

**NON-DISCRIMINATION AND ANTI-HARASSMENT  
POLICY**

**A. POLICY STATEMENT ON EQUAL EMPLOYMENT  
OPPORTUNITY**

WinCo reaffirms its equal employment opportunity policy of complying with all federal, state and local equal employment opportunity/non-discrimination laws applicable to your employment.

In carrying out this policy, we will - to the extent required by applicable law governing employment at each respective store or facility - recruit, hire, and promote for all job classifications and take all personnel actions without regard to race, religious creed, color, national origin, ancestry, physical dis-ability, mental disability, medical condition, gender, age, sexual orientation, marital or veteran status, family and medical care leave status, or other protected characteristics, to the extent such character-istics are protected by federal law or the state or local laws of the jurisdiction in which the store or facility where you work is located.

WinCo and its employees shall not discriminate against its customers, vendors and service providers in any manner based on the race, religious creed, color, national origin, ancestry, disability, medical condition, gender, or other protected characteristics, to the extent each of those referenced characteristics are protected by federal law or the state or local laws of the jurisdiction in which the store is located. All customers will be treated in a professional manner without any regard to any individual characteristic protected by law.

The Company's obligations under this policy may vary from state to state. If you have any questions about the Company's obligations in your state, please contact the Vice President of Human Resources.

**B. POLICY AGAINST HARASSMENT**

WinCo believes in respecting the dignity of employees and expects every employee to show respect for all of our employees, customers, vendors, service providers and applicants for employment. Accordingly, the Company prohibits sexual, racial and other harassment based on any protected status conferred by

federal law or the law applicable in the jurisdiction in which any incident may have occurred. WinCo will not tolerate any form of harassment in violation of this policy against any employee, customer, vendor, service provider or applicant for employment. WinCo requires its employees to report harassment complaints so that it may investigate the facts and take remedial action, if necessary.

## **1. Prohibited Conduct**

The conduct prohibited by this policy includes unwelcome conduct, whether verbal, physical or visual, that is based upon the individual's protected status, such as gender or race. This policy also prohibits harassment on the basis of the protected status of an individual's relatives, friends or associates. Among the types of conduct prohibited by this policy are epithets, slurs, negative stereotyping or intimidating acts based on an individual's protected status and the circulation or posting of written or graphic materials that show hostility toward an individual because of his or her protected status.

## **2. Sexual Harassment**

Sexual harassment is a problem in society that deserves special mention. According to the EEOC, unwelcome sexual advances, requests for sexual favors, and other verbal, physical or visual conduct based on sex constitutes sexual harassment when (1) submission to such conduct becomes an implicit or explicit term or condition of employment, (2) submission to or rejection of the conduct is used as the basis for any employment decision, or (3) the conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment. This policy forbids harassment by any employee to any colleague, customer, vendor, service provider or applicant for employment based on gender regardless of whether it rises to the level of a legal violation.

Sexual harassment is not limited to explicit demands for sexual favors or offensive conduct that is sexual in nature. It can include unwelcome conduct based on gender, whether directed toward a person of the opposite or same sex. It also may include such actions as (1) sex-oriented verbal kidding, teasing or jokes; (2) repeated sexual flirtations, advances or propositions; (3) continued or repeated verbal abuse of a sexual nature; (4) graphic or degrading comments about an individual or his or her appearance or sexual activity; (5) visual conduct, including leering, making sexual gestures, the display of sexually suggestive objects or pictures, cartoons or posters; (6) subtle pressure for sexual activity; (7) suggestive or obscene letters, notes or invitations; or (8)

offensive physical contact such as patting, grabbing, pinching, or brushing up against another's body. Even where the conduct is not sufficiently severe or pervasive to constitute actionable harassment, the Company does not condone any such conduct in the workplace, regardless of the circumstances.

### **C. EMPLOYEE RESPONSIBILITY AND REPORTING**

All employees are expected to avoid any conduct that could be perceived as a violation of this policy. Employees should take every step possible to make sure that any concern they have about a perceived violation of this policy is known to management. Any employee who believes he or she has been subjected to or has witnessed any form of unlawful discrimination or harassment is encouraged and expected immediately to notify the Vice President of Human Resources, who is authorized to receive such complaints and who is authorized to designate individuals to investigate on behalf of the Company. Employees are also encouraged to notify the employee's Store Manager or appropriate Vice President. This policy does not require reporting discrimination or harassment to any individual who you believe is the source of discrimination or harassment. If you do not know the name and the contact information of the person(s) to whom you must report a complaint, you should ask your facility' or store manager for the information. You can also contact WinCo's Corporate Office in Boise, Idaho, and speak with a representative from Human Resources to determine the appropriate contact information.

If you are governed by a collective bargaining agreement or working condition and wage agreement and you have made a complaint pursuant to this policy and if you are not satisfied with the Company response and would like to file a grievance, you must comply with the provision for Settlement of Disputes in the Agreement that governs your employment. If you have any questions about how to file a formal written grievance, please see your shop steward, business agent, the chairperson of the Employee Association at your store, the Store Manager, or the Vice President of Human Resources.

### **D. COMPANY RESPONSE**

All reports describing conduct that reasonably appears to raise a concern under this policy will be promptly and thoroughly investigated. The Company may put reasonable interim measures in place, while the investigation proceeds. The Company will take further appropriate action once the report has been thoroughly investigated. The action may be a conclusion that a violation occurred, as explained immediately below. The Company may also conclude, depending on the circumstances, either that no violation

of policy occurred or that the Company cannot conclude whether a violation occurred, or not.

If an investigation confirms that a violation of this policy has occurred, the Company will take corrective action, including discipline, up to and including dismissal, as is appropriate under the circumstances, regardless of the job positions of the parties involved. The Company may discipline an employee for any inappropriate conduct discovered in investigating reports made under this policy, regardless of whether the conduct amounts to a violation of law or even a violation of this policy. If the person who engaged in the wrongful conduct under this policy is not employed by the Company, then the Company will take whatever corrective action is reasonable, appropriate and possible under the circumstances.

#### **E. GOVERNMENT PROGRAMS**

Consistent with this policy against discrimination and harassment, the Company maintains posters on its bullet-in boards that refer to legal definitions of discrimination and harassment. These posters identify governmental agencies to contact for information on how and when to file administrative claims. We refer you to these bulletin boards for more information about government programs concerning equal opportunity and harassment. Using the Company complaint process does not prevent an employee from filing a claim with a state governmental agency or with a federal agency such as the EEOC. The time period for filing a claim continues to run during a Company investigation. Our policy provides for immediate notice of problems to the Company officials listed above, so that we may address and resolve any problems without waiting for any legal proceedings to run their course.

#### **F. NO RETALIATION**

The Company forbids retaliation against anyone for reporting discrimination or harassment, registering a complaint pursuant to this policy, assisting in making a complaint, or cooperating as a witness in an investigation. This policy forbids all forms of retaliation, whether it be a formal employment action or an informal action, such as harassment. Anyone experiencing or witnessing any conduct they believe to be retaliatory is to immediately follow the Company notification procedures outlined above.

#### **G. CONFIDENTIALITY**

**In an investigation and in imposing any discipline, the Company will attempt to preserve confidentiality to the extent**

**possible under the circumstances. In particular cases, a limited amount of disclosure may be necessary to enable the Company to conduct a meaningful investigation. To attempt to ensure confidentiality, employees are discouraged from talking, about Company investigations with other employees, other than the Vice President of Human Resources; the Store Manager, the appropriate department Vice President, individuals designated by the Vice President of Human Resources, and those who actually investigate the complaints.**

## **H. WINCO'S COMMITMENT**

WinCo's commitment extends to identifying concerns about discrimination and harassment and stopping any problematic conduct before it becomes a violation of policy or law. Every employee must share this commitment and report concerns.

Nothing in this policy, however, creates a contractual obligation on the part of the employee or WinCo (to its employees, customers, vendors or service providers) and nothing in this policy affords an individual any legal rights not recognized by federal laws or the laws of the state or locality in which the store or the facility at which an incident occurs is located.

I have read and acknowledge receipt of WinCo Foods Non-Discrimination and Anti-Harassment Policy. I have also viewed the DVD on Non-Discrimination and Anti-Harassment provided by WinCo Foods. I understand what the policy and DVD mean and agree to comply with them. I have had the opportunity to ask questions regarding this policy and understand that I may contact Human Resources for further clarification on this policy. I understand that violation of such policy may be sufficient cause for disciplinary action, up to and including discharge.

(Jt Exh. 1(o)(emphasis added).)

The policies above apply while employees are on "WinCo property." (JF 5(x).) Each employee is required to (1) read the policies and acknowledge that he or she has had an opportunity to ask questions and receive answers regarding the policies and (2) that he or she understands what the policies "mean." (Jt Exh. 1(n).) There is no evidence in the record to suggest that any employee was confused or did not understand what the policies mean.

The CBA specifically provides that employees are required to read, acknowledge and comply with WinCo's nondiscrimination harassment policy and refer to that policy while at WinCo. (Jt Exh. 1(p).) Under the "Settlement of Dispute" section of the CBA the parties to the

CBA SPECIFICALLY incorporated the Company’s Personnel Policies—“the employee association dispute hearings subcommittee in its settlement of any dispute shall not have the right to alter, amend, delete, or add to any of the terms and conditions of this agreement (including Company Personnel Policies) in reaching its decision.” (Jt Exh. 1(p), p. 10; *see also* Grievance Committee Purpose and procedure (the committee has the authority to uphold the decision of management or modify company actions while staying within the labor agreement and company personnel policies”) at pp. 18, 19.)

There is nothing in the record to suggest that the rules above were promulgated in response to any union activity. Indeed, the employer representative in the Arizona store agreed to the rules. (Jt. Exh. 1(p), at p. 16.) There is nothing in the record that has been applied to restrict the exercise of Section 7 rights. *See* Joint Motion and Stipulation of Facts. There is nothing in the record to establish any union bias.

### **PROCEDURAL HISTORY**

The Parties have agreed to a stipulation of facts. The Board approved the Joint Motion on July 6, 2017.

### **LEGAL ANALYSIS**

#### **A. Burden of Proof and Legal Standards**

The General Counsel bears the burden of proof on each allegation in the Complaint. *See Nations Rent, Inc.*, 342 NLRB 179, 180 (2004) (“The General Counsel has the burden of proving every element of a claimed violation of the Act.”); accord *Des Moines Register & Tribune Co.*, 339 NLRB 1035, 1037 n.5 (2003); *Western Tug & Barge Corp.*, 207 NLRB 163, 163 n.1 (1973). As discussed in more detail below, because the General Counsel has failed to substantiate the allegations in the Complaint, Respondents respectfully submit that the Complaint should be dismissed in its entirety.

The Board’s well-settled test for determining a Section 8(a)(1) violation is an objective one:

[I]nterference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer’s motive or on whether the coercion succeeded or failed. The test is whether the employer

engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.

*American Freightways Co.*, 124 NLRB 146, 147 (1959). *See also Miami Systems Corp.*, 320 NLRB 71, n. 4 (1995), *enf'd in relevant part sub nom.*, 111 F.3d 1284 (6th Cir. 1997) (“The test to determine interference, restraint, or coercion under Section 8(a)(1) is an objective one . . .”). The General Counsel bears the ultimate burden of proving under this objective standard, interference, restraint or coercion in violation of the Act.

### **B. The Current Standard Under *Lutheran Heritage***

Under the current Board law, an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of Section 7 rights. *See Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). The Board first decides whether the rule *explicitly* restricts activities protected by Section 7.” *See Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). Second, even if not explicit, the rule still may violate Section 8(a)(1) where “(1) employees would reasonably construe the language to prohibit Section 7 activity; [or] (2) the rules was promulgated in response to union activity; or (3) the rules has been applied to restrict the exercise of Section 7 rights. *Lutheran Hospital*, *supra* at 647. In determining whether a work rule is unlawful, the Board must “give the rule a reasonable reading.”

In analyzing an employer work rule, the Board must not read a particular phrase in isolation and must not presume improper interference with employee rights. *See Lutheran Heritage*, 343 NLRB at 646. Rather, the Board must read the entire policy, as a whole, and determine whether a reasonable employee would construe the language to prohibit Section 7 activity. *See id.*, *see also Echostar Tech., LLC*, Case No. 27-CA-066726, 2012 WL 4321039, at \*11 (Sept. 20, 2012) (Anderson, ALJ) (“Clearly one may not select portions or fragments of text on which to base a decision about the effect on an employee when it is reasonable that an employee considering the text at issue would inevitably read more.”).

This case, like almost all the recent cases involving handbooks, involves the first prong that employees would reasonably construe the language to prohibit Section 7 activity. To wit—

the policies at issue are facially neutral policies—none of the policies at issue expressly restrict NLRA protected activity. (Jt. Exh. 1(n).) At most, they are ambiguous. Moreover, there is no record of any actual infringement on employees Section 7 rights. The infringement on the Respondents’ property rights, however, are tangible and real.

**C. The *Lutheran Heritage* Standard Is Flawed And Should Be Overruled**

As articulated in then-Member (now Acting Chairman) Miscimarra’s dissent in *William Beaumont Hospital*, “the time has come for the Board to abandon *Lutheran Heritage Village-Livonia*,” 343 NLRB 646 (2004), which renders unlawful all employment policies, work rules and handbook provisions whenever any employee “would reasonably construe the language to prohibit Section 7 activity.” 363 NLRB No. 162 (2016) at p. 7. As Chairman Miscimarra explained, “multiple defects are inherent in the *Lutheran Heritage* test.” *Id.* Specifically, the “reasonably construe” standard entails a “single-minded consideration of NLRA-protected rights, without taking into account the legitimate justifications of particular policies, rules and handbook provisions,” which is “contrary to Supreme Court precedent and the Board’s own cases.” *Id.* at p. 8. Indeed, *Lutheran Heritage* “constitutes an obvious and completely unexplained departure from the consideration of competing interests that has been deemed necessary in numerous cases decided by the Supreme Court, other courts and the Board.” *Id.* at p. 21.

Under *Lutheran Heritage*, the Board exclusively considers “only the potential, hypothetical impact of a particular rule on NLRA-protected activity, even though such activity may never occur, it may lie at the periphery of the protection afforded by [the NLRA], and any adverse impact on Section 7 activity may be substantially outweighed by compelling justifications.” *Id.* at p. 20. As explained by Chairman Miscimarra, the *Lutheran Heritage* standard stems from a “misguided belief that unless employers correctly anticipate and carve out every possible overlap with NLRA coverage, employees are best served by not having employment policies, rules and handbooks,” and “requires perfection that literally has become the enemy of the good.” *Id.* at p. 8. Moreover, “*Lutheran Heritage* fails to recognize that many ambiguities are inherent in the NLRA itself,” and it also “improperly limits the Board’s own

discretion,” as it “does not permit the Board to recognize that some types of Section 7 activity may lie at the periphery of [the NLRA] or rarely if ever occur.” *Id.* at p. 9.

*Lutheran Heritage* also does not permit the Board to differentiate between and among different industries and work settings, nor does it permit the Board to take into consideration specific events that may warrant a conclusion that particular justifications outweigh a potential future impact on some type of NLRA-protected activity. *Id.* Abandoning *Lutheran Heritage* would permit the Board to engage in a more refined evaluation of these significant variables. *Id.* at p. 15. The *Lutheran Heritage* test also has “defied all reasonable efforts to make it yield predictable results,” and “has been exceptionally difficult to apply, which has created enormous challenges for the Board and courts and immense uncertainty and litigation for employees, unions and employers.” *Id.* at p. 9. *Lutheran Heritage*’s “single-minded focus precludes reasonable distinctions that the Board should be making in this important area,” and “[t]hough well-intended, the *Lutheran Heritage* standard prevents the Board from giving meaningful consideration to the real-world ‘complexities’ associated with many employment policies, work rules and handbook provisions.” *Id.* At bottom, *Lutheran Heritage* is “contrary to the Board’s responsibility to promote certainty, predictability, and stability,” it has caused “extensive confusion and litigation for employers, unions, employees and the Board itself,” and “to a substantial degree, [it] has led to arbitrary results.” *Id.* at p. 13, 15, 18.

As Chairman Miscimarra explained, “[t]he Board has the ‘duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy.’” *Id.* at p. 9 (citing *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967) and adding emphasis). As a result, when evaluating a facially neutral policy, rule or handbook provision, the Board should evaluate “(i) the potential adverse impact of the rule on NLRA-protected activity, *and* (ii) the legitimate justifications an employer may have for maintaining the rule.” 363 NLRB No. 162 at p. 9 (emphasis in original). The Board should engage in “a meaningful balancing of these competing interests, and a facially neutral rule should be declared unlawful *only* if the justifications are outweighed by the adverse impact on Section 7 activity.” *Id.* (emphasis added). When engaging in this analysis, the Board should

differentiate among different types of NLRA-protected activities and “recognize those instances where the risk of intruding on NLRA rights is ‘comparatively slight.’” *Id.* (citing *Great Dane*, 388 U.S. at 34).

WinCo respectfully requests that the Board adopt the standard proposed by Acting Chairman Miscimarra. Should the standard change to the above-referenced balancing test, while the instant matter is pending before the Board, WinCo requests and reserves the right to provide live testimony on the issues.

In addition, the *Lutheran Heritage* standard is inconsistent with fundamental American jurisprudence, which generally provides that facially neutral policies that do not have an actual disparate impact are legal. *Wards Cove Packing v. Antonio*, 490 U.S. 642 (1989). Indeed, the burden is on the party challenging the rule to show actual authentic harm, not a hypothetical danger. *Id.* at 659. This is common sense. Applying the *Lutheran* Standard defies common sense in the workplace. In reality, the *Lutheran* Standard places the burden on the employer to show that its policies could not conceivably chill rights. This is an unfair and unrealistic standard. Workplace policies are rarely perfect. Indeed, the recent decisions are in reality, examples of legal gymnastics in search of a problem that does not in actuality exist. In the real world employees know that these policies have nothing to do with the NLRA and do not chill any rights.

**D. The Collective Bargaining Agreement Incorporated The Very Rules Being Challenged; The Union Accepted and Agreed to the Work Rules At Issue**

As an initial matter, none of WinCo’s work rules are unlawful because the Parties’ collective bargaining agreement (“CBA”) incorporated the very rules being challenged—the employee representative accepted the language. It is well established that a collective bargaining representative may waive members’ statutory rights under the Act. In the words of the Supreme Court, the Act “extinguishes the individual employee’s power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.” *N.L.R.B. v. Allis Chambers MFG. Co.*, 388 U.S. 175, 180 (1967). Justice Black, dissenting, adding that “by joining a union an employee gives up or waives some of his section 7 rights.” *Id.* at 200 (Black, J. dissenting). Indeed, unions routinely waive rights to bargain over

changes to the terms and conditions of their employment and fundamental rights like the right to strike. *See Ador Corp.*, 150 N.L.R.B. 1658, 1660 (1965) (bargaining units can waive the right to bargain over changes in the terms and conditions of employment such as the right to eliminate production lines and lay off employees); *W. Steel Casting Co.*, 233 N.L.R.B. 870 (1977) (strike rights may be waived); *Prudential Insurance Co.*, 275 N.L.R.B. 208 (1985) (Wiengarten rights may be waived).

Here, in adopting the provisions of the WinCo Employee Handbook by incorporating the rules in the Collective Bargaining Agreement, the company and bargaining unit agreed to specific working of the workplace rules, such as a basic dress code, the types of tattoos employees can display at work, the use of foul language, and access to company computers. (Jt Exh. 1(p) at pp. 2, 10.) There is no evidence that WinCo, the Employee Association, or any employee construed the policies to chill any protected rights. In the words of Chairman Miscimarra, the rules represent neutral policies which, “do not expressly restrict Section 7 activity, were not adopted in response to NLRA-protected activity, and have not been applied to restrict NLRA-protected activity.” *William Beaumont Hosp.*, 363 NLRB No. 162 (Apr. 13, 2016) (M. Miscimarra, dissenting). Put another way, the rules themselves are not unlawful and have not been applied unlawfully. They are being challenged under the ambiguous prong of the *Lutheran Heritage* test. Thus, since the bargaining unit unambiguously agreed to them as reasonable conditions of employment, the bargaining unit waived any right to challenge their lawful application to its members. Indeed, the employees’ representative clearly did not construe the wording of the policies now being challenged as chilling union rights as they themselves agreed to them and each word in the policies.

To be sure, under *Lutheran Heritage Village-Livonia Hospitals*, 343 NLRB 646 (2004), the Board has struck down facially neutral terms of employment that govern things like dress codes. However, the vast majority of these cases involve non-unionized workforces in which a bargaining unit has not agreed to the language that constitutes the dress code or other handbook provision. The small number of cases brought by unions involve instances where employers have applied otherwise lawful work rules in ways that in actuality chill employee rights, for

example by prohibiting employees from wearing union insignia without proper justification. *See Hertz Rent-A-Car*, 297 N.L.R.B. 363 (1989) (employer sought to discipline a union steward for wearing a steward’s pin on her uniform in violation of the dress code provision in the collective bargaining agreement); *AT&T*, 199 L.R.R.M. 1386 (N.L.R.B. A.L.J. 2014). These cases do not stand for the proposition that the Act prohibits employers and bargaining units from agreeing to rules such as facially neutral dress code policies. Instead, they restrict how employers can use the rules to actually as opposed to hypothetically limit employees’ rights under the Act. *See AT&T, supra* (“Here too, if the parties wanted to ban all pins or stickers the agreement could have so specified. They did not. Under these circumstances, there can be no waiver by the Union of the employees’ statutory right to wear union insignia.”) citing *Hertz Rent-A-Car, supra*.

The facts of this case do not implicate *Hertz Rent-A-Car*, *AT&T*, or similar cases. No party—not the bargaining unit, the company, the employees, or even the General Counsel—asserts that WinCo seeks to limit employees’ rights under the Act. Instead, the General Counsel wants to prohibit lawful employee representatives from negotiating and entering into lawful conditions of employment because someone may use them at some future time for an unlawful purpose. If this is the rule, then an imaginative Board could indiscriminately strike down almost any lawfully negotiated term or condition of employment. WinCo and its bargaining unit negotiated and agreed upon the policies in the handbook, which the company has lawfully applied to its workforce. (Jt Exh. 1(n).) As a result, the bargaining unit waived its right to challenge the rules’ lawful application to bargaining unit members. Unless and until the company tries to use the rule to discriminate against its employees, no unfair labor practice should lie. For this reason, the General Counsel’s charge should be denied.

**E. WinCo’s Work Performance Policy Does Not Chill Section 7 Rights**

**1. WinCo’s Work Performance Policy**

The following portions of WinCo’s Work Performance Policy are at issue:

**I. WORK PERFORMANCE**

All employees are expected to:

1. Contribute to a positive work environment through cooperative and professional interactions with co-workers, customers and vendors. Employees are expected to extend courtesy to customers and fellow workers and cooperate with other employees at all times. Employees are not to use abusive, foul, or offensive language, engage in gossip, or otherwise cause unrest amongst employees, customers or vendors.

(JF 5(s).)

WinCo's work performance policy, which states that "[e]mployees are not to use abusive, foul, or offensive language, engage in gossip, or otherwise cause unrest amongst employees, customers or vendors" does not violate the Act. There is no evidence in the record that WinCo created the policy in response to any union activity, nor is there any evidence that the policy has been applied to restrict the exercise of anyone's Section 7 rights.

The General Counsel also cannot meet its burden in demonstrating that employees would reasonably construe the rule to restrict their Section 7 rights. As mentioned above, the Board must read WinCo's policies in context, and consider the policy's rationale and business purpose. *See Lutheran Heritage*, 343 NLRB at 646, *citing Lafayette Park*, 326 NLRB at 825, 827; *Adtranz ABB Daimler-Benz Transp., N.A. v. N.L.R.B.*, 253 F.3d 19, 28 (D.C. Cir. 2001) ("the NLRB may not cavalierly declare policies to be facially invalid without any supporting evidence, particularly where, as here, there are legitimate business purposes for the rule in question and there is no suggestion that anti-union animus motivated the policy.")

Here, the title of the policy is "Work Performance" and the rule refers to employees contributing to a "positive work environment through cooperative and professional interactions with co-workers, customers and vendors." (JF 5(s).) The rule requires employees to behave in a way that promotes "courtesy" and "cooperat[ion]" towards customers and fellow workers with respect to work. *Id.* In the context of the workplace presented in the record, this rule addresses a normal workplace, on a normal workday.

A reasonable employee of WinCo would interpret the policy as requiring professional manners, courtesy and cooperation towards customers and coworkers. The reasonable employee would also understand the rule to express a universally accepted guide for conduct in a

responsible workplace. Such a reading of the rule is reasonable under *Lutheran Heritage*, 343 NLRB at 646. A reasonable employee would not construe a prohibition against using “abusive, foul, or offensive language” towards customers or fellow employees as restricting Section 7 activity.

In addition, the Board has held that such restrictions are lawful. See *Palms Hotel & Casino*, 344 NLRB 1363, 1367-68 (2005) (holding lawful rule that prohibited conduct that “is or has the effect of being injurious, offensive, threatening, intimidating, coercing or interfering” with employees or customers); *Lutheran Heritage*, 343 NLRB 646, at 647-49 (finding lawful rule that prohibited “harassment,” “verbal, mental, and physical abuse,” and “abusive and profane language”). Such rules reflect the lawful expectation that employees “comport themselves with general notions of civility and decorum in the workplace,” *Palms Hotel*, at 1368 (inasmuch as both employers and employees have a substantial interest in promoting a workplace that is “civil and decent.”). *Lutheran Heritage*, at 649; see also *Hills & Dales Gen. Hosp.*, 2012 NLRB LEXIS 79, \*16-18 (Feb. 17, 2012) (Carter, ALJ) (work rule providing “[w]e will represent Hills & Dales in the community in a positive and professional manner in every opportunity” not unlawful). The rule requiring employees to work in a cooperative environment goes no further than this. Any finding to the contrary cannot be reconciled with the above-cited cases.

WinCo has a legitimate right to establish a civil and decent workplace. WinCo’s general request that employees avoid abusive or foul behavior would not reasonably be understood by employees to restrict Section 7 activity; WinCo employees are perfectly capable of organizing a union or exercising their other statutory rights without resort to such behavior. Consequently, the request that WinCo employees avoid such behavior is not unlawful.

## **F. WinCo’s Dress, Hygiene and Appearance Standards Policy Is Lawful**

### **1. WinCo’s Dress, Hygiene and Appearance Standards Policy**

The following portions of WinCo’s Dress, Hygiene and Appearance Standards policy are at issue:

## **II. DRESS, HYGIENE, AND APPEARANCE STANDARDS**

All employees are required to maintain the highest standards of personal hygiene, cleanliness and grooming. All employees must adhere to their location's applicable dress code and/or uniform code policy which will be posted at each location. Final judgment on appropriate dress and appearance rests solely with management.

7. Employees may wear or display tattoos provided that such tattoos are professional looking and in good taste. Management has the discretion to require any employee to cover tattoos that are excessive or are inappropriate. Any visible tattoo that is offensive must be appropriately covered.

(JF 5(s).)

WinCo's Dress, Hygiene, and Appearance Standards policy is also lawful. The policy does not chill employees' Section 7 Rights. In addition, WinCo's 5th Amendment property rights outweighs employees' Section 7 rights.

### **2. WinCo's Policy Does Not Chill Section 7 Rights.**

Like its Work Performance policy, WinCo's Dress, Hygiene, and Appearance Standards policy does not explicitly restrict Section 7 activity, was not created by WinCo in response to any Section 7 activity, and has not been applied to restrict the exercise of any employee's Section 7 rights. WinCo's policy also cannot reasonably be construed by employees to restrict their Section 7 rights for several reasons.

First, WinCo is in the retail grocery business. (JF 5(w).) Its Dress, Hygiene, and Appearance Standards policy is just that—about proper dress, hygiene and appearance in a retail environment. The two paragraphs at issue within the policy in no way directly or indirectly restrict Section 7 activity. (Jt Exh. 1(n).) WinCo's policy has a legitimate rationale and business purpose—to ensure that its employees are practicing the requisite hygiene (hands must be washed, nails trimmed, facial hair must be clean) in an environment where food and other products are being sold and maintaining the appropriate attire in a retail setting. A review of the entire policy demonstrates that the rule is for legitimate business purposes and that there is no evidence of any anti-union animus. *See Lutheran Heritage*, 343 NLRB at 646, *citing Lafayette*

*Park*, 326 NLRB at 825, 827; *Adtranz ABB Daimler-Benz Transp., N.A. v. N.L.R.B.*, 253 F.3d 19, 28 (D.C. Cir. 2001) (“the NLRB may not cavalierly declare policies to be facially invalid without any supporting evidence, particularly where, as here, there are legitimate business purposes for the rule in question and there is no suggestion that anti-union animus motivated the policy.”)

Second, WinCo’s paragraph regarding tattoos also does not violate the Act. WinCo’s policy allows visible tattoos so long as they are “professional looking and in good taste.” (Jt Exh. 1(n).) The portion of the policy stating that “offensive” tattoos must be covered is also lawful as WinCo has a legitimate business reason for wanting its employees—an extension of WinCo—to maintain a professional appearance in front of customers and other employees.

Third, given the straightforward nature of the policy, a reasonable WinCo employee would interpret the policy as requiring good hygiene and adherence to the dress code, especially in a retail food establishment. It would be unreasonable to conclude that a WinCo employee would interpret the policy as restricting Section 7 activity, or specifically wearing a tattoo that said “union” on it.

Finally, any claims by the General Counsel that WinCo’s policy requiring tattoos deemed “excessive,” “inappropriate” or “offensive” to be covered up is unlawful is also without merit. Any conclusion that tattoos deemed “excessive,” “inappropriate” or “offensive” theoretically includes union tattoos is unreasonable and illogical considering the undeniable fact that there is absolutely no evidence that WinCo has displayed any anti-union animus or maintains any policy prohibiting union-related insignia, apparel, or tattoos.

WinCo has a legitimate right to maintain a dress code and rules about hygiene. Consequently, the request that WinCo employees practice good hygiene and adhere to the company’s dress code is not unlawful.

### **3. The Fifth Amendment Protects WinCo’s Property Rights and WinCo’s Fifth Amendment Property Rights Outweigh Employees’ Section 7 Rights.**

From its earliest cases construing the NLRA, the Supreme Court has recognized the weight of an employer’s property rights and that such rights are explicitly protected from federal

interference by the Fifth Amendment to the United States Constitution. *See NLRB v. Fansteel*, 306 U.S. 240 (1939) (holding that an employer’s property rights must give way only where necessary to effectuate the central policies of the Act, which are “to safeguard the rights of self-organization and collective bargaining,” and that the NLRA does not abrogate the right of an employer to protect its property). Indeed, the right to control one’s property even in the labor context is one of the most fundamental of all rights. *See Purple Commc’ns, Inc.*, 361 NLRB No. 126 at \*17 (Dec. 11, 2014) (Miscimarra dissenting).

Through the Due Process and Takings Clauses in the Fifth Amendment, as well as other clauses, the United States Constitution affirms property rights throughout the United States. As James Madison’s Federalist No. 10 explains, there is a “diversity in the faculties of men, from which the rights of property originate,” the protection of which “is the first object of government.” The Federalist No. 10 (James Madison). The Supreme Court has consistently extended this bedrock principle to labor relations, acknowledging that employers’ property rights are vital and amount to a key consideration when analyzing whether the Act has been violated.

In *Babcock & Wilcox*, the seminal case on this issue, the Supreme Court made clear that consideration of an employer’s property rights is vital to deciding unfair labor practice charges, stating: “Organization rights are granted to workers by the same authority, the National Government, that preserves property rights,” and “[a]ccommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other.” *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). The rights bestowed by the Fifth Amendment include the right not only to decide who comes on the property but also the conditions that must be complied with to remain there, and the right of employees to self-organization as balanced with the right of employers to maintain discipline on their property was also recognized in *Republic Aviation Corp v. NLRB*, 324 U.S. 793 (1945).

More recently, the Supreme Court reiterated the importance of employer property rights, finding that “accommodation between employees’ § 7 rights and employers’ property rights ‘must be obtained with as little destruction of one as is consistent with the maintenance of the other.’” *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 534 (1992) (quoting *Babcock*). For

nonemployees, the Court set an extremely high bar for transgressing employer property rights, stating: “§ 7 simply does not protect nonemployee union organizers *except* in the rare case where the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels.” *Id.* at 537 (internal quotation marks and citation omitted) (emphasis in original). And for an employer’s employees, the bar to trespass and unauthorized use of employer property remains high, requiring the Board to balance “the conflicting interests of employees to receive information on self-organization on the company’s property from fellow employees during nonworking time, with the employer’s right to control the use of his property.” *Id.* (quoting *Babcock*). In *Lechmere*, the Court noted with approval the Board’s efforts in *Babcock* to balance the conflicting interests of employees to receive information on self-organization on the company’s property from fellow employees during nonworking time, with the employer’s right to control the use of its property. *Id.*

With respect to WinCo’s Dress, Hygiene, and Appearance Standards policy, WinCo’s Fifth Amendment property rights outweigh employees’ Section 7 rights. Here, in challenging WinCo’s policies, the General Counsel completely disregards WinCo’s right to control its property, and certainly makes no attempt to accommodate competing interests with as little destruction to WinCo’s property interests as is consistent with the maintenance of its employees’ Section 7 rights. The General Counsel challenges the policy that provides that tattoos may be visible provided they are professional looking and in good taste and that any visible tattoo that is offensive must be appropriately covered. This policy implicates WinCo’s property right to control the use of its premises and to maintain discipline on its property. As the D.C. Circuit noted, “[p]erhaps no facet of business life is more important than a company’s place in public estimation . . . [g]ood grooming regulations reflect a company’s policy in our highly competitive business environment.” *Fagan v. Nat’l Cash Register Co.*, 481 F.2d 1115, 1124-25 (D.C. Cir. 1973); *see also Cloutier v. Costco Wholesale*, 311 F. Supp. 2d 190 (D. Mass. 2004) (considering an employer’s dress code policy, the aim of which was to present a professional appearance to customers).

WinCo's tattoo policy exists to effectuate this business interest. In reality, customers and their children do not want their employees displaying tattoos that contain profanity, pornography, nudity or that suggest uncleanness. It does not take much to imagine how a family with young children would react to a pornographic tattoo. This goes to the heart of any business, and as with the recording policy, pushes the property rights analysis in favor of preserving WinCo's policy.

**G. WinCo's No Solicitation Policy Is Lawful**

**1. WinCo's No Solicitation Policy.**

The following portion of WinCo's Bulletin Boards/No Solicitation policy is at issue:

**VIII. BULLETIN BOARDS/NO SOLICITATION**

**1. There shall be no solicitation of or by employees for any personal business opportunities (including fundraisers, home party sales, etc.) on Company property.**

(JF 5(s)(emphasis added).)

**2. WinCo's No Solicitation Policy Does Not Chill Section 7 Activity**

WinCo's policy mandating that "there shall be no solicitation of or by employees for any personal business opportunities (including fundraisers, home party sales, etc.) on Company property" is also lawful for several reasons. First, the policy does not expressly restrict any Section 7 activity. Second, there is no evidence that the policy was promulgated in response to any union activity, or that the rule has been applied to restrict the exercise of anyone's Section 7 rights.

Third, the General Counsel cannot meet the burden of showing that employees would reasonably construe the language to prohibit Section 7 activity. WinCo's policy is specific—it only prohibits employees from solicitation of "*personal business opportunities.*" (Jt Exh. 1(n)(emphasis added).) The policy further provides examples of personal business opportunities to include "fundraisers" and "home party sales." *Id.* There is no ambiguity in the wording of WinCo's solicitation policy given its clear reference to personal business opportunities. Given the narrow nature of the policy, an employee could not reasonably construe the policy as restricting Section 7 activity. *See Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253

F.3d 19, 28 (D.C. Cir. 1991) (noting that the Board itself has cautioned against such parsing in finding that the employer’s no-solicitation rule was lawful).

Lastly, the facts of the instant matter are in stark contrast to prior Board cases finding no solicitation policies unlawful. For example, in *UPS Supply Chain*, 357 NLRB 1295 (2011), the no solicitation rule at issue prohibited employees from soliciting or distributing literature in work areas during work time “for any purpose.” There, the Board held that the rule was unlawful because “[e]mployers may ban solicitation in working areas during working time but may not extend such bans to working areas during nonworking time.” *Id.* at 1296; *see also*, *Restaurant Corp. of America v. NLRB*, 827 F.2d 799, 806, 264 U.S. App. D.C. 148 (D.C. Cir. 1987) (“[A]n employer may not generally prohibit union solicitation . . . during nonworking times or in nonworking areas.”) (*citing NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112-113, 76 S. Ct. 679, 100 L. Ed. 975 (1956); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-798, 65 S. Ct. 982, 89 L. Ed. 1372 (1945)). In *UPS Supply Chain*, there was also an indication of anti-union animus because the employer had terminated an employee for making anti-union statements. *Id.* at 1297.

Here, the facts are dissimilar to the circumstances in *UPS Supply Chain* and other cases dealing with no-solicitation provisions. WinCo does not have a broad prohibition against solicitation “for any purpose”—it only prohibits solicitation of “*personal business opportunities*” such as fundraisers and home party sales. (Jt Exh. 1(n)(emphasis added).) Nor is there any evidence of union animus in the evidentiary record. The policy clearly does not prohibit Section 7 activity related to wages or working conditions.

## **H. WinCo’s Telephone and Computer Use Policy Is Lawful**

### **1. WinCo’s Telephone and Computer Use Policy**

The following portions of WinCo’s Telephone and Computer Use policy are at issue:

## **IX. TELEPHONE AND COMPUTER USE.**

1. Store phones, computers, copiers, and fax machines are strictly business machines and employees are not permitted to use them for any purpose other than Company business, except in an emergency. Personal long distance calls are not allowed on Company telephones.

3. Use of Company computers for personal reasons is strictly forbidden. All messages sent and received, including personal messages and information stored on Company computers is Company property regardless of content. Employees have no right to privacy with respect to any messages or information received or created on Company computers. WinCo Foods reserves the right to monitor and review any employee's e-mail or internet use at any time. See WinCo Foods' Information Security Policy and WinCo Foods' Acceptable Use Policy.

4. Employees are not permitted to possess or use personal handheld devices, including cellular phones, smart phones, MP3 players, audio/visual recorders, cameras, head phones, etc. while on the clock, except while on a designated rest break.

(JF 5(s).)

WinCo's Telephone and Computer use policy, however, is also lawful. The policy does not chill Section 7 rights. In addition, WinCo's Fifth Amendment property rights outweigh any protections for Section 7 activity.

## **2. WinCo's Policy Does Not Chill Section 7 Rights**

Like all of the other policies at issue, WinCo's Telephone and Computer use policy is facially neutral, was not created in response to any Section 7 activity, and has not actually been applied to restrict any employee's Section 7 activity. *See* Joint Motion and Stipulation of Facts. More importantly, a reasonable employee would not, and could not, interpret the sections of the policy at issue as restricting any Section 7 activity, especially given the advances in today's technology.

For example, WinCo's restriction of allowing employees to use "[s]tore phones, computers, copiers and fax machines" for "Company business" is a legitimate policy aimed at preventing employees from using company equipment for non-business reasons. The policy even goes so far as to prohibit "personal long distance phone calls." (Jt Exh. 1(n).) The legitimacy of the policy is further supported by the fact that WinCo's workforce consists of meat cutters, grocery department clerks and container clerks who work in a grocery store setting. (Jt. Exh. 1(p), p. 13.) In other words, WinCo's employees do not generally work in offices or use telephones or fax machines on a regular basis. There is no evidence in the record to show that

employees subject to the policies would even consider using such equipment for Section 7 activity.

Furthermore, such a policy could not be construed by employees as restricting Section 7 activity in a day and age where employees own personal cell phones, have personal e-mails and use social media outlets like Facebook and Twitter. If anything, the policy's reference to fax machines and copiers demonstrates that the policy is narrowly tailored to only ensure that employees are not using company equipment for non-business related reasons. It is unreasonable to conclude that WinCo's policy chills Section 7 activity because it prohibits employees from using its copiers or fax machines.

The portion of the policy prohibiting employees from using "Company computers for personal reasons" is also lawful given that there is no evidence in the record that employees have regular access to WinCo's e-mail network or the internet. The facts of this matter are in stark contrast to those in *Purple Commc'ns, Inc.*, 361 NLRB No. 126 (2014). In *Purple Communications*, all of the employees at issue were assigned "individual accounts on its email system" and used "those accounts every day that they are at work." *Purple Commc'ns, Inc.*, 361 NLRB No. 126, slip op. at 3 (2014) Further, employees accessed their company email accounts on the computers at their work stations, computers in other areas of the facility, and were even able to access their work emails from their personal computers smartphones. *Id.*

Here, there is no evidence in the Joint Motion and Stipulation of Facts that any of WinCo's employees, all of whom work in a grocery market setting, have any routine or regular access to WinCo's internet or an assigned e-mail address. The record is devoid of any evidence that employees who are meat cutters or grocery clerks have any e-mail access at all. *See* Joint Motion and Stipulation of Facts. Given that the General Counsel cannot show that WinCo employees have such access, there is no reasonable scenario where employees would interpret the policy to chill Section 7 activity.

Finally, the portion of the policy prohibiting employees from using handheld devices such as "cellular phones, smart phones... audio/visual recorders, cameras" while "on the clock, except for while on a designated rest break" is also lawful. WinCo has established a legitimate

policy established to ensure that its employees, all of whom again work in a grocery store retail setting, are working, assisting customers and are not distracted by a personal cell phone. There is no evidence in the record that grocery store clerks, meat cutters or any other employees have a reason to need or use their personal devices during their shifts. WinCo's policy is also legitimate for safety reasons. WinCo has a legitimate interest to ensure that employees are not injured while working by being distracted by doing non-work related tasks on their phones such as text messaging. WinCo's policy only restricts the possession of personal devices during working time, when employees should ostensibly be working. It does not restrict communications between employees, or personal devices during non-work times. An employee could not reasonably conclude that this particular portion of the policy seeks to chill Section 7 activity.

### **3. WinCo's Policy Is Lawful Under The Fifth Amendment**

WinCo's Fifth Amendment rights also support a finding that WinCo's Telephone and Computer Use policy lawful. "An owner of property is normally entitled to permit its use while imposing conditions or restrictions, based on the mere fact that he or she is *the owner* [of the property]." *Purple Commc'ns, Inc.*, 361 NLRB No. 126, at \*17 (Miscimarra dissenting) (emphasis in original).

WinCo has the right to restrict employee use of its property and equipment. This policy is designed to prevent employees from using WinCo's property for personal use, or from accessing WinCo's information systems without authorization. As an initial matter, the Board has held that employers can ban employees from using its equipment for employees' personal use. The only recent exception made to this general rule is the use of email. *Purple Commc'ns, Inc.*, slip op. at 8-9 (Dec. 11, 2014) ("Our decision encompasses email use by employees only; we do not find that nonemployees have rights to access an employer's email system.") Any other equipment that could be encompassed within "information systems," is not encompassed within the Board's *Purple Communications* decision. WinCo disagrees with the Board's current position on email use given the Board's well-established past precedent and the Board's dissent in *Purple Communications*. See e.g., *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663-64 (6th Cir. 1983) (holding that the employer has the right to "regulate and restrict employee use of

company property.”); *Purple Commc’ns, Inc.*, 361 NLRB No. 126, slip op. 14, at 18-61 (Dec. 11, 2014) (Miscimarra and Johnson, dissenting).

Nevertheless, the exceptions carved out by the Board in *Purple Communications* apply here. In *Purple Communications*, the Board noted two exceptions to its change in Board precedent. First, the Board noted that its holding applied “only to employees who have already been granted access to the employer’s email system in the course of their work and does not require employers to provide such access.” *Id.* at slip op. 1. Given the nature of employment with WinCo, WinCo does not grant access to its email systems to its employees. There is no evidence that WinCo provides such access. There is no evidence in the record that WinCo employees have assigned work stations where WinCo provides email access, and are not otherwise provided access to WinCo’s email systems. *See* Joint Motion and Stipulation of Facts.

The Board also acknowledged that a total ban on non-work use of email may be lawful where special circumstances require such a ban. *Id.* at 1. The Board noted that “it is the *nature of the employer’s business* that determines whether special circumstances justify a ban on such communications at a particular location at the workplace.” *Id.* at 13-14 (emphasis provided). Here, the nature of WinCo’s business requires a total ban. As explained, employees provide grocery services to WinCo customers. The total ban is required to ensure that WinCo employees are, among other things, assisting customers, checking employees out at the cash registers and stocking store shelves. The total ban is also required to maintain customer satisfaction, production and discipline. Given these circumstances, WinCo’s prohibition falls under the Board’s carved exception.

**I. WinCo’s Electronic Communication and Recording Devices Policy Is Lawful**

**1. WinCo’s Electronic Communication and Recording Devices Policy**

The following portions of WinCo’s Electronic Communication and Recording Devices Policy are at issue:

**X. ELECTRONIC COMMUNICATION AND  
RECORDING DEVICES**

Violations of any policies listed in this section will be considered gross misconduct.

2. Employees are never allowed to engage in photography or audio or visual recording on Company property unless specifically authorized to do so for Company business purposes.

3. Employees are not to access or use any Company computers, records, files, etc. without express permission and authorization pertaining to their current title/position with the Company. Employees are not to access private employee or customer information. Employees are not to provide access to any Company information to any individual not otherwise authorized to access such information.

4. Employee use of computer/internet technologies outside of work must not violate any Company policy, be detrimental to the Company's interests, or interfere with the employee's regular work duties. Specifically, employees must not use the Company logo or link to its website without Company permission. Any statements the employee makes that include the Company's name must clearly identify the employee making the statement and clearly state that the statements are the employee's own opinions, and not those of the Company.

## **2. The No-Recording Policy Does Not Chill Section 7 Rights**

WinCo's Electronic Communication and Recording Devices policy is also lawful. The policy does not explicitly restrict any Section 7 activity. In addition, there is absolutely no evidence that WinCo promulgated the rule in response to any union activity, or that the rule has been applied to restrict the exercise of anyone's Section 7 rights.

Most importantly, the General Counsel cannot carry the burden to show that maintenance of the policy would reasonably chill Section 7 rights for several reasons. First, employees would reasonably read the rules to safeguard their right to engage in union-related and other protected conversations. Prohibiting recordings in the workplace allows employees to openly communicate and engage in the free exchange of ideas without having to worry about statements or conduct being recorded to their detriment. As noted by Miscimarra in his dissent in *Whole Foods Market, Inc.*, 363 NLRB No. 87 (2015), the "rules are no less solicitous of open, free, spontaneous and honest conversations about union representation or group action for the purpose of mutual aid or protection than of other subjects of conversation. And if employees want to record a conversation, they may do so upon mutual consent."

Second, even if an employee might reasonably interpret the no-recording rules to prohibit Section 7 activity, this is not sufficient to establish a violation under *Lutheran Heritage Village*.

Rather, the Board stated in *Lutheran Heritage Village* that where a workplace rule does not refer to Section 7 activity, the Board “[would] not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way.” *Whole Foods Market*, 363 NLRB NO. 87, slip op. at 7 (2015) (Miscimarra dissent, citing *Lutheran Heritage Village*, *supra*, 343 NLRB at 647 (emphasis in original)). Here, a reasonable employee would understand that WinCo’s purpose in maintaining these rules is to promote open, free, spontaneous and honest dialogue—including dialogue protected by Section 7.

Third, WinCo’s policies also serve a legitimate business concern—to protect customers from unauthorized recordings and unauthorized disclosures. A reasonable employee would also understand that a purpose of the Electronic Communication and Recording Devices policy is to protect customers and prevent employees from video recording or photographing WinCo customers, which could expose WinCo to liability if an employee engages in such unauthorized conduct. As discussed in more detail below, several states require that two parties consent before being recorded. *See, e.g.* 18 U.S.C. § 2511(2)(d); Cal Penal Code § 632; Ore. Revised Statutes Ann. § 9.73.030(1) (a); Wash. Rev. Code Ann. § 9.73.030(1)(a).

Lastly, the Board must read WinCo’s policies in context, and consider the policy’s rationale and business purpose. *See Lutheran Heritage*, 343 NLRB at 646, *citing Lafayette Park*, 326 NLRB at 825, 827; *Adtranz ABB Daimler-Benz Transp., N.A. v. N.L.R.B.*, 253 F.3d 19, 28 (D.C. Cir. 2001) (“the NLRB may not cavalierly declare policies to be facially invalid without any supporting evidence, particularly where, as here, there are legitimate business purposes for the rule in question and there is no suggestion that anti-union animus motivated the policy.”) Here, an employee would reasonably conclude that the policy serves to protect customers and confidential data because the policy specifically states that employees “are not to access private employee or customer information,” or “provide access to any Company information to any individual not otherwise authorized to access such information.” It is clear from a review of the policy in its entirety that it prohibits employees from accessing or disclosing information that the employee is not authorized to access. WinCo clearly ties the rules at issue to stated legitimate interests.

WinCo's Electronic Communication and Recording Devices policy is lawful and does not chill Section 7 rights.

### **3. The 5<sup>th</sup> Amendment Protects WinCo's Property Rights**

The Fifth Amendment also protects WinCo's property rights and supports a finding that WinCo's policy is lawful. Like with WinCo's Telephone and Computer Use Policy discussed above, the General Counsel's argument with respect to the Electronic Communication and Recording Devices policy should be rejected as an unwarranted invasion of WinCo's property rights.

"An owner of property is normally entitled to permit its use while imposing conditions or restrictions, based on the mere fact that he or she is *the owner* [of the property]." *Purple Commc'ns, Inc.*, 361 NLRB No. 126, at \*17 (Miscimarra dissenting) (emphasis in original). This includes the right to restrict the types of activities that occur on a premises, like making video and audio recordings thereon. *See Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 518 (4th Cir. 1999) (employees' acts of secretly videotaping within a store constituted trespass because it exceeded the scope of the invitation to work at the site). Thus, to invalidate a recording policy such as WinCo's, the Board must balance WinCo's property rights against the rights of WinCo employees. Here, any reasonable balancing test would favor the employer.

In the retail setting, it is self-evident that the employer has a substantial business interest in making its customers welcome and comfortable while on its private property. Ensuring that employees are not taping customers or filming them while shopping would seem to be a common sense restriction in achieving this end. If customers had to worry about every employee recording them, customers would shop elsewhere and the value of the business would diminish. Moreover, under some circumstances, it is illegal to tape record individuals without their consent under federal law and in many states in which WinCo does business. *See, e.g.* 18 U.S.C. § 2511(2)(d); Cal Penal Code § 632; Ore. Revised Statutes Ann. § 9.73.030(1) (a); Wash. Rev. Code Ann. § 9.73.030(1)(a). Thus, WinCo's policy exists to both preserve its business and prohibit unlawful conduct on its property. These justifications for WinCo's decision to restrict

video and audio recordings on its property push the policy's balance firmly in favor of affirming the policy as valid exercise of WinCo's property rights.

WinCo's rule prohibiting the use of any "Company computers, records, [or] files, etc." to access "private employee or customer information" is also lawful. WinCo operates retail grocery stores. As discussed above in Section G.2., *supra*, there is no evidence in the record that employees have access to e-mail, are given assigned computers or even have assigned e-mail addresses. There is also no Section 7 right to the use of information belonging to customers or other employees. Under these facts, WinCo has an absolute property right over its computers, its company records and files and the information contained on them. Its property rights over such information clearly outweighs its employees' Section 7 rights.

WinCo's rule against using its company logo or link to its website is also a protected property right. WinCo owns the rights to its company logo as it is a registered trademark and its copyrighted its website. As such, it is clear that WinCo has a legitimate business interest to prohibit employees from using its trademark in any manner without express authorization. In addition, Paragraph 4 of the Electronic Communication and Recording Device policy can be reasonably construed to allow employees to engage in their Section 7 rights because it expressly asks employees making any statements that include the Company's name to "clearly state that the statements are the employee's own opinions, and not those of the Company."

## **J. The Policies Within WinCo's Gross Misconduct Section Are Lawful**

### **1. WinCo's Gross Misconduct Policy**

The following portions in bold are those portions of WinCo's Gross Misconduct Policy that are in issue:

#### **XVI. GROSS MISCONDUCT**

**Commission of any act considered gross misconduct is grounds for immediate discharge. Examples are listed below. This listing is not all-inclusive and will be modified as appropriate.**

- 1. Dishonesty, including but not limited to falsification of any Company record including employment records; any fraudulent act or statement related Company business or providing false information to management.**

**3. Altercations, fighting, or acts of disrespect towards customers, fellow employees or management; insubordination with management; any act of intimidation and/or any threat of violence or act of violence of any kind.**

**6. Performing any act, either on the job or off the job, which brings discredit to the Company or harms employee morale.**

**9. Unauthorized use of Company property or equipment and/or negligent or willful destruction of or damage to Company property or equipment.**

**14. Any other item listed in these Company Personnel Policies document a Gross Misconduct.**

(JF 5(s).)

As discussed in detail below, all of the policies within WinCo's Gross Misconduct section are also lawful.<sup>1</sup> None of the policies explicitly restrict any Section 7 activity, there is absolutely no evidence that WinCo promulgated the rule in response to any union activity, and the rule has not been applied to restrict the exercise of anyone's Section 7 rights. The General Counsel will not be able to show that maintenance of any of the policies would reasonably chill Section 7 rights as well.

**2. WinCo's Policies Regarding Fraudulent Acts, Altercations and Fighting Are Lawful.**

The General Counsel alleges that Part 1 of WinCo's Gross Misconduct policy prohibiting "any fraudulent act or statement related Company business or providing false information to management" is unlawful. The General Counsel's claims are without merit. First, policy cannot be read in isolation. *See Guardsmark, LLC*, 344 NLRB 809, 809 (2005) ("In determining whether a challenged rule is lawful, we will give the rule a reasonable reading. That is, we will refrain from reading particular phrases in isolation or presuming improper interference with employee rights."). Part 1 is part of a sequence of sections that prohibit topics such as theft (Part 2), conviction of a crime that impacts the workplace (Part 4) and drinking or inhaling intoxicants, or the use, possession, or sale of any illegal substance (Part 5). These parts discuss conduct that

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<sup>1</sup> The confidentiality provision challenged by the General Counsel in WinCo's Gross Misconduct policy will be addressed with the other confidentiality provision within WinCo's discrimination and harassment policy discussed in Section II.J.1 below.

includes illegal conduct and/or violations of the law. Read in context, Part 1 could not be interpreted to prohibit Section 7 activities.

Second, the first sentence of Part 1, which the General Counsel does not take issue with, prohibits “[d]ishonesty, including but not limited to the falsification of any Company record including employment records.” The next sentence, which is challenged by the General Counsel, prohibits “any fraudulent act or statement related Company business or providing false information to management.” It is clear from a review of the policy as a whole that WinCo has a legitimate business reason to prohibit employees from falsifying Company records, making false statements, and/or engaging in fraudulent conduct that could affect WinCo’s business. A reasonable employee could not, and would not, interpret such a policy as restricting their Section 7 rights, as employees do not have a protected right at engaging in fraudulent conduct or falsifying Company records.

Part 2 of WinCo’s Gross Misconduct policy is also lawful. The policy lawfully prohibits “[a]ltercations, fighting, or acts of disrespect towards customers, fellow employees or management; insubordination with management; any act of intimidation and/or any threat of violence or act of violence of any kind.” The General Counsel, however, alleges that WinCo’s prohibition of “[a]ltercations, fighting, or acts of disrespect towards...management; insubordination with management; any act of intimidation” is unlawful. Once again, the policy cannot be read in a vacuum or in isolation. *See Guardsmark, LLC*, 344 NLRB 809, 809 (2005). The policy clearly prohibits altercations that include fighting and violence. Engaging in violence or fighting, or an act of intimidation that borderlines on fighting and violence towards a manager, is not a protected Section 7 right. WinCo has a legitimate business interest in protecting all of its employees, including those in management, from acts of violence, fighting, and any intimidation. Part 2 of WinCo’s Gross Misconduct policy cannot be reasonably read as chilling an employee’s Section 7 rights.

Moreover, the Board has generally found that rules that clearly apply to prohibiting insubordination do not restrict protected activities. *See, e.g., Copper River of Boiling Springs*, 360 NLRB No. 60 (2014) (finding lawful employer's maintenance of a rule prohibiting

“[i]nsubordination to a manager or lack of respect and cooperation with fellow employees or guests,” which “includes displaying a negative attitude that is disruptive to other staff or has a negative impact on guests”). *See also Lytton Rancheria of Cal.*, 361 NLRB No. 148, at\*4 (2014) (“If the prohibition . . . were limited to ‘insubordination,’ which connotes defiance of a workplace superior’s job-related directive, we would agree . . . that the allegation should be dismissed.”). *Accord Community Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1088-89 (D.C. Cir. 2003) (finding lawful a rule prohibiting “insubordination . . . or other disrespectful conduct” and noting that “[w]here . . . the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule could be interpreted that way.”).

Here, WinCo’s policy restricts an even narrower set of circumstances than the policies at issue in *Copper River* and *Lytton Rancheria*—those relating towards “[a]ltercations, fighting, or acts of disrespect” in addition to insubordination towards management. There is no ambiguity here—WinCo’s policy, when read in its entirety, could not be interpreted as restricting Section 7 activity.

Parts 1 and 2 of WinCo’s Gross Misconduct policy are lawful. Both policies at issue are aimed at encouraging compliance with various criminal laws such as fraud and battery, while at the same time discouraging dishonesty and violence. In this context, no reasonable employee would read a sentence encouraging “integrity” to prohibit conduct protected by Section 7 of the Act. *See, e.g., Ark Las Vegas*, 335 NLRB 1284, 1291 (2001) (handbook rules prohibiting employees from conducting themselves “unprofessionally or unethically, with the potential of damaging the reputation or a department of the Company” and from “participating in any conduct, on or off duty, that tends to bring discredit to or reflect adversely on” themselves, their coworkers, the company or its guests not unlawful because the rule appeared to be aimed at conduct not related to Section 7 activity and instead seemed to be related to crimes or other misconduct).

### **3. WinCo's Policy Regarding Acts That Bring Discredit to WinCo Is Also Lawful**

Similarly, WinCo's policy prohibiting employees from "[p]erforming any act, either on the job or off the job, which brings discredit to the Company or harms employee morale" is also lawful. A request to employees to avoid behavior that discredits WinCo or harms employee morale is not unlawful. *See Lutheran Heritage Village-Livonia*, 343 NLRB at 647-48 (finding that work rule that prohibited employees from using "abusive or profane language" was lawful, reasoning that employers have a legitimate right to establish a "civil and decent workplace," that profane language is not an inherent part of Section 7 activity, that it "preposterous" to conclude that employees are incapable of organizing a union or exercising their other statutory rights under the NLRA without resort to abusive or profane language, and that the average employee would not read a general prohibition on abusive or profane language as a ban on Section 7 activities); *Tradesmen Int'l*, 338 NLRB 460, 462 (2002) (finding that employee manual rule that prohibited "statements which are slanderous or detrimental to the company or any of the company's employees" was not unlawful, reasoning that slanderous and detrimental statements are obviously harmful to an employer's reputation).

Here, WinCo has as legitimate business interest in protecting its image and its reputation. It also has a legitimate interest in making sure that employee morale is positive. When read in context, the Company's rule banning conduct that discredits WinCo does not refer to protected activity or labor disputes. *See TT&W Farm Products, Inc.*, 358 NLRB 1117 (2012) ("The Respondent's no-disparagement rule has the same tenuous connection to protected activity as the rule considered in *Lutheran Heritage*."). As such, the rule does not violate Section 8(a)(1) because it does not have a chilling effect on employees' Section 7 rights.

### **4. WinCo's Policy Prohibiting The Negligent or Willful Destruction or Damage to Company Property or Equipment Is Lawful**

WinCo's policy against "[u]nauthorized use of Company property or equipment and/or negligent or willful destruction of or damage to Company property or equipment" is also lawful and could not be interpreted as chilling employees' Section 7 rights. Employees do not have a Section 7 right to willfully or negligently destroy or cause damage to WinCo's property or

equipment. WinCo has a legitimate business reason for the policy—to protect its property and equipment. An employee could not possibly conclude that the policy restricts Section 7 activity.

In addition, as discussed at length above in Section II.G.2, WinCo also has a Fifth Amendment right over its property. *See Purple Commc’ns, Inc.*, 361 NLRB No. 126, at \*17 (Miscimarra dissenting) (holding that “[a]n owner of property is normally entitled to permit its use while imposing conditions or restrictions, based on the mere fact that he or she is *the owner* [of the property].”) (emphasis in original). WinCo has the right to restrict employee use of its property and equipment and require authorization before such use. WinCo hereby incorporates its Fifth Amendment rights arguments from Section.II.G.2 above.

## **K. WinCo’s Confidentiality Provisions Are Lawful**

### **1. WinCo’s Confidentiality Provisions**

The following confidentiality provisions have been challenged by the General Counsel:

## **XVI. GROSS MISCONDUCT**

8. Unauthorized disclosure of confidential information, including but not limited to confidential Company financial, security, or trade secret information or employee legally protected information.

## **NON-DISCRIMINATION AND ANTI-HARASSMENT POLICY**

### **G. CONFIDENTIALITY**

In an investigation and in imposing any discipline, the Company will attempt to preserve confidentiality to the extent possible under the circumstances. In particular cases, a limited amount of disclosure may be necessary to enable the Company to conduct a meaningful investigation. To attempt to ensure confidentiality, employees are discouraged from talking, about Company investigations with other employees, other than the Vice President of Human Resources; the Store Manager, the appropriate department Vice President, individuals designated by the Vice President of Human Resources, and those who actually investigate the complaints.

(JF 5(s).)

There are two confidentiality provisions at issue: (1) a rule prohibiting the “[u]nauthorized disclosure of confidential information, including but not limited to confidential

Company financial, security, or trade secret information or employee legally protected information;” and (2) a rule discouraging the disclosure of an ongoing investigation with other employees. Both of the confidentiality provisions challenged by the General Counsel are lawful.

**2. WinCo’s Confidentiality Provision Prohibiting The Disclosure Of Confidential Company Information Or Employee Legally Protected Information Does Not Chill Section 7 Activity**

WinCo’s first confidentiality provision is located within its Gross Misconduct policy. The policy does not explicitly restrict any Section 7 activity, there is no evidence that WinCo promulgated the rule in response to any union activity, and WinCo has not applied the rule to restrict the exercise of employees’ Section 7 rights.

Most importantly, the General Counsel cannot carry the burden to show that maintenance of the policy would reasonably chill Section 7 rights. The Board has repeatedly recognized that employers have the right to adopt sensible policies that address legitimate confidentiality concerns. *See Super K-Mart*, 330 NLRB 263, 263 (1999); *Lafayette Park Hotel*, 326 NLRB 824, 826 (1998). The Board has specifically recognized that employers must protect the unauthorized disclosure of confidential and proprietary information, including its customer’s information. *Mediaone of Greater Florida, Inc.*, 340 NLRB 277, 278 (2003); *see also K-Mart*, 330 NLRB 263, 264 (1999) (rule stating that “Hotel business and documents are confidential” and “disclosure of such information is prohibited” found lawful). *See also Lafayette Park*, 326 NLRB at 826 (“Clearly, businesses have a substantial and legitimate interest in maintaining the confidentiality of proprietary information.”). In *Mediaone*, the policy precluded the disclosure of “customer and employee information, including organizational charts and databases.” *Id.* The Board agreed with the administrative law judge’s decision that “this provision would not tend to chill employees in their exercise of Section 7 rights because it cannot reasonably be read to prohibit disclosure of employees’ wages, hours, or working conditions. [The policy could be] reasonably read as prohibiting only disclosure of the Respondent’s information assets and intellectual proprietary, which is *private business information the Respondent has a right to protect.*” *Id.*

Here, like the facts in *Mediaone*, WinCo’s policy prohibits disclosure of “confidential information, including but not limited to confidential Company financial, security, or trade secret information or employee legally protected information.” Even if taken out of context, the policy could not be read broadly to include terms and conditions of employment. The policy is narrowly tailored and includes words such as “trade secret” and “employee legally protected information.” Such wording further supports a finding that an employee would interpret the policy to only preclude the disclosure of information is proprietary and legally confidential, such as medical records or social security numbers. No reasonable employee could believe that they are restricted from disclosing their terms and conditions of employment. Thus, a broad restriction cannot be inferred from the policy challenged in this matter. *See Safeway*, 338 NLRB 525, 527 (2002) (refusing to rely upon a “chain of inferences upon inferences” to find that employees would believe their own terms and conditions of employment were covered by the rule and that their own co-workers and unions were “unauthorized” persons); *Lafayette Park Hotel*, 326 NLRB at 826 (refusing to engage in “speculation” that the policy prohibited conduct not specifically addressed by the rule and that such conduct includes Section 7 activity). Because a reasonable reading of the policy does not prohibit employees from voluntarily disclosing to others their terms and conditions of employment, there is no violation of the Act.

**3. WinCo’s Confidentiality Provision Prohibiting The Disclosure Of Confidential Company Information Or Employee Legally Protected Information Does Not Chill Section 7 Activity**

The second confidentiality provision at issue is located within WinCo’s Non-Discrimination and Non-Harassment policy. As an initial matter, it should be noted that the policy does not prohibit employees talking about investigations with other employees—it merely discourages it to ensure confidentiality of an ongoing investigation. The policy does not explicitly restrict any Section 7 activity, there is no evidence that WinCo promulgated the rule in response to any union activity, and WinCo has not applied the rule to restrict the exercise of employees’ Section 7 rights.

The General Counsel also cannot carry the burden to show that maintenance of the policy would reasonably chill Section 7 rights. The rule is narrowly tailored to discrimination

and harassment investigations, and does not even prohibit employees from discussing investigations—it merely discourages it. No discipline is even threatened as a result of any disclosure. WinCo has a legitimate business reason to encourage confidentiality to protect the integrity of an investigation into potentially unlawful conduct.

For a company such as WinCo, there is a significant need for confidentiality surrounding any investigation into such conduct. WinCo’s interest in maintaining confidentiality includes the desire to ensure the integrity of such investigations, the desire to prevent workplace retaliation for participation in such investigations, and the desire to foster an environment where employees will readily report suspected fraud. These interests outweigh any potential employee interest in discussing the fact that a fraud investigation is being or has been conducted or in disclosing the results of an investigation except as required by law.

WinCo’s policy is also distinguishable from the policy the Board found unlawful in *Banner Health*, 358 NLRB No. 93 (slip op.) (2012). In *Banner Health*, a human resources consultant routinely asked employees making *any* type of complaint not to discuss the matter with their coworkers while the company’s investigation was ongoing. 358 NLRB No. 93, slip op. at 2. The Board found that the employer’s “blanket approach” failed to meet the requirement that it show that its justifications for confidentiality outweighed employees’ Section 7 rights. *See id.* Here, by contrast, WinCo’s policy does not apply to all investigations of any type; rather, it applies to investigations into harassment and/or discrimination to protect the integrity of the investigations and any parties involved in the investigation. WinCo therefore has not taken a blanket approach to investigations. Moreover, unlike the situation in *Banner Health*, WinCo’s written policy contains an exception to confidentiality “to the extent possible under the circumstances.” Given the above, a reasonable employee could not possibly interpret the confidentiality provision to restrict Section 7 activity.

### **CONCLUSION**

The Board should dismiss the Complaint. As described herein, the *Lutheran Heritage* standard should be overturned in favor of a balancing test that evaluates “(i) the potential adverse impact of the rule on NLRA-protected activity, *and* (ii) the legitimate justifications an

employer may have for maintaining the rule.” Regardless of the standard, WinCo’s employment policies do not violate Section 8(a)(1) of the National Labor Relations Act and the Complaint must be dismissed.

**RESPECTFULLY SUBMITTED** this 10th day of August, 2017.

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**CERTIFICATE OF SERVICE**

I, Candice T. Zee, do hereby certify that I have caused a true and correct copy of the foregoing **RESPONDENTS' BRIEF TO THE NATIONAL LABOR RELATIONS BOARD** to be served on all parties of record in the manner listed below on this 10th day of August, 2017:  
**E-filed:**

The Honorable Gary Shinnars  
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